

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE EX REL. CITIFINANCIAL, INC.,

Petitioner,

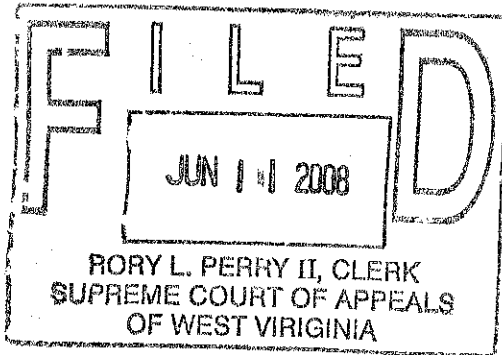
vs.

CASE NO. 081254

**JOHN T. MADDEN, Judge, Marshall County, and
PAUL W. LIGHTNER,**

Respondents.

**BRIEF *AMICUS CURIAE* OF
THE AMERICAN FINANCIAL SERVICES ASSOCIATION
AND THE CONSUMER CREDIT INDUSTRY ASSOCIATION
IN SUPPORT OF CITIFINANCIAL, INC.'S
PETITION FOR A WRIT OF PROHIBITION**



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May it please the Court:

The American Financial Services Association (“AFSA”) and the Consumer Credit Industry Association (“CCIA”), for their brief *amicus curiae* in support of the Petition of CitiFinancial, Inc. for a Writ of Prohibition, state:

INTERESTS OF *AMICI CURIAE*

AFSA is the national trade association for the consumer credit industry protecting access to credit and consumer choice. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

AFSA has provided services to its members for over ninety years. AFSA’s officers, board and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

CCIA was originally organized in 1951 as the Consumer Credit Insurance Association to be the trade association of insurance companies underwriting consumer credit insurance products sold by lenders and assuring loan repayment in the event of consumer/debtor death or disability. The scope of activity evolved as new insurance products were introduced to the marketplace, products like credit property, credit unemployment, and collateral protection. More recently this industry - providing consumers with the financial security of knowing debt will be repaid or assets protected in the event of unexpected but foreseeable events - has introduced non-insurance debt and asset protection products.

CCIA promotes high ethical standards for the business of consumer credit insurance, related lines of insurance, and other consumer credit protection products and services. Whether credit insurance or debt and asset protection products, individuals and financial services providers are regularly confronted with changing compliance expectations. CCIA provides the

professional staff and infrastructure enabling members to decrease time spent researching new issues and increase the accuracy and usefulness of information.

A number of AFSA's and CCIA's members offer credit insurance to their customers in West Virginia. This credit insurance is offered on forms approved by the West Virginia Insurance Commissioner at premiums approved by the Insurance Commissioner. Per West Virginia statutes, the credit insurance is written by insurers licensed to offer and write insurance in West Virginia.

Though this action was initially only a simple action related to Lightner's failure to timely pay a loan he obtained from CitiFinancial, Lightner has turned this garden-variety collection action into a judicial referendum on the entire consumer credit and credit insurance industries, including AFSA's and CCIA's members doing business in West Virginia. The Circuit Court missed an opportunity to return this action to its proper status as a collection action when it denied CitiFinancial's Motion for Dismissal, for a Stay, and for Partial Summary Judgment. Now, CitiFinancial has been placed in the position of defending itself from claims in Circuit Court that the West Virginia Legislature has committed to the expertise and jurisdiction of the Insurance Commissioner.

AFSA and CCIA's brief will provide needed background for the Court with regards to the nature and purposes of credit insurance. AFSA and CCIA's brief will also explain how the decision by the Circuit Court to ignore the express statutory structure allowing CitiFinancial to offer the disputed coverage at the rates offered to Lightner, as well as the delegation of primary jurisdiction by the Legislature to the Insurance Commissioner, will lead to unintended litigation over credit insurance premiums. That litigation will, in turn, damage the credit industry, the

insurance industry and consumers in West Virginia by potentially reducing the availability of credit insurance, a beneficial product for West Virginia consumers.

This Court should therefore grant CitiFinancial's Petition for a Writ of Prohibition.

FACTUAL BACKGROUND

What is Credit Insurance?

Credit insurance is term insurance designed to repay all or a part of the borrower's debt on the occurrence of certain specified events.

There are several forms of credit insurance and each provides protection against a different contingency that could affect the ability of a borrower or the borrower's surviving heirs to repay his or her outstanding credit balance. The four basic forms of credit insurance are (i) credit life insurance; (ii) credit disability insurance (also referred to as credit accident and sickness insurance); (iii) involuntary unemployment insurance (also referred to as loss of income insurance); and (iv) credit property insurance. Credit life insurance is similar to a traditional term life insurance policy; however, upon death of the borrower, the proceeds of the policy are used to pay off the borrower's debt with any excess proceeds paid to the borrower's estate. Credit disability insurance as well as involuntary unemployment insurance pays all or a part of a borrower's monthly loan payment in the event he or she becomes totally disabled or loses income as a result of involuntary unemployment. Finally, credit property insurance pays to repair or replace property purchased with the proceeds of a borrower's loan or property used as collateral for a loan.

Why Do People Buy Credit Insurance?

The factors that lead individuals to purchase credit insurance are many. Borrowers having a favorable opinion of credit insurance overwhelmingly cited the security or sense of security provided by credit insurance as motivation for their purchase.¹ Furthermore, when borrowers were asked what factors weighed on their decision to select a particular lender, borrowers generally emphasized convenience.²

Benefits of Credit Insurance

One of the most significant benefits of credit insurance is that such insurance provides security to many borrowers who could not secure equivalent insurance. Many critics of credit life insurance assert that borrowers are able to secure term life insurance at a rate that is significantly less than credit life insurance. Although supporters of credit insurance would certainly debate that premise, regardless of whether equivalent insurance is more affordable as a general matter than credit insurance, critics overlook the fact that a significant number of borrowers cannot secure insurance equivalent to credit insurance or cannot secure such insurance at an affordable price.³ For example, while older individuals and those in poor health may be rejected for term life insurance or may only be able to secure term life insurance at a tremendous cost, no physical examination is generally required for credit life insurance and the premium rate

¹ Thomas A. Durkin, *Consumers and Credit Disclosures: Credit Cards and Credit Insurance*, FEDERAL RESERVE BULLETIN 201, 212 (April 2002), <http://www.federalreserve.gov/pubs/bulletin/2002/0402lead.pdf>. [Attached as Exhibit 1 to this Brief.]

² Anthony W. Cynak & Glenn B. Canner, *Consumer Experiences with Credit Insurance: Some New Evidence*, ECONOMIC REVIEW: FEDERAL RESERVE BANK OF SAN FRANCISCO 5, 12 (Summer 1986 No. 3), http://www.frbsf.org/publications/economics/review/1986/86-3_5-20.pdf. [Attached as Exhibit 2 to this Brief.]

³ Anthony W. Cynak, *Credit Insurance: Beauty or Beast?*, Federal Reserve Board of San Francisco Weekly Newsletter (Oct. 10, 1986), <http://www.frbsf.org/publications/economics/letter/1986/el86-41.pdf>. [Attached as Exhibit 3 to this Brief.]

for credit insurance is typically constant for all borrowers.⁴ For such borrowers, credit insurance may be the only means by which they are able to provide security for themselves or their families. The CCIA summarized this position by explaining that “[w]e can agree that higher income consumers who can afford large amounts of life insurance probably do not need credit insurance We can’t agree that applies to most consumers.”⁵ Moreover, on October 10, 1986, the Federal Reserve Board of San Francisco published an article in its weekly newsletter that concluded that “[f]or older borrowers, or for borrowers that cannot afford or medically qualify for regular life insurance . . . credit insurance may be worthwhile” and that “[f]or many borrowers, credit insurance can conveniently fulfill a legitimate need for protection against loan default.”⁶

Another significant benefit provided by credit insurance is that credit insurance can be made available in small amounts of coverage at a relatively economical price. As the CCIA has explained, credit insurance may be an attractive option for those consumers that do not desire large amounts of insurance coverage.⁷ Assume, for example, that a consumer wishes to purchase life insurance to protect against a \$6,000 debt, but does not desire insurance beyond that amount. The three year cost of credit insurance for that amount would be approximately \$90. However, the three year cost for a \$50,000 term life insurance policy would be approximately \$475. While a traditional term life insurance policy for \$6,000 in theory might be less expensive than credit insurance, no ordinary insurance agency will provide coverage for such a small amount.

⁴ *Id.*

⁵ CONSUMER CREDIT INDUSTRY ASSOCIATION, COST EQUATION: CREDIT LIFE AND TERM LIFE INSURANCE, <http://www.cciaonline.com/consumers.nsf/consinfo1.htm>. [Attached as Exhibit 4 to this Brief.]

⁶ Cynak, *supra* note 3.

⁷ CONSUMER CREDIT INDUSTRY ASSOCIATION, COST EQUATION: CREDIT LIFE AND TERM LIFE INSURANCE, <http://www.cciaonline.com/consumers.nsf/consinfo1.htm>. [Attached as Exhibit 5 to this Brief.]

Therefore, for those consumers that seek insurance with relatively small coverage and do not seek to be overinsured, credit insurance provides a cost effective insurance solution.

Another benefit of credit insurance that is often overlooked by critics and supporters of credit insurance alike is that credit insurance is extremely convenient for consumers. It is clear from surveys of those who purchased credit insurance that convenience is a major factor in borrowers' decision-making process regarding credit insurance. In fact, 58.6% of borrowers have indicated that they purchased credit insurance directly from a lender either because it "was available from the lender" or for "convenience."⁸ Credit insurance provides a convenient solution for consumers seeking security for themselves and their families. Credit insurance is typically offered by the lender that extends credit to the borrower and policy premiums become part of the loan principal, to be repaid to the lender. This saves borrowers the time and effort of investigating and securing a separate insurance provider and making separate payment arrangements, which may raise the possibility of unintentionally forgetting to make a loan payment.⁹ Critics of credit insurance often fail to account for this benefit, although it is one that certainly seems important to consumers.

What Do Consumers Think About Credit Insurance?

Whether due to convenience, monetary savings, or simply the fact that insurance is available to them, borrowers are absolutely clear on one point – they like credit insurance. Multiple surveys and research conducted on credit insurance have proven this point beyond doubt. For example, in 2001, over 90% of consumers that had purchased credit insurance on

⁸ Cynak, *supra* note 3, at 12.

⁹ WELLS FARGO FINANCIAL, CREDIT ACCIDENT AND HEALTH INSURANCE (2008), <http://financial.wellsfargo.com/consumer/insurance/resourceCenter/credit/basics.html>. [Attached as Exhibit 6 to this Brief.]

installment credit held a favorable opinion of the insurance.¹⁰ Furthermore, 94.2% of borrowers who purchased such credit insurance indicated that they would purchase it again.¹¹ It is also important to note the lack of negative responses regarding credit insurance from consumers who had purchased such insurance. The percentage of borrowers that reported that they were dissatisfied with credit insurance purchased in connection with mortgages or installment credit were 1.6% and 2.6% respectively.¹² Even more revealing, there were no respondents that reported being very dissatisfied with their purchase of credit insurance.¹³

Although the wide range of benefits provided by credit insurance are likely reflected in the broad satisfaction of borrowers that have purchased credit insurance, research has indicated a number of particular factors that have led to this high approval. Research indicates that borrowers with favorable opinions of credit insurance tend to emphasize the “security or sense of security” that such insurance provides.¹⁴ Another major factor cited by borrowers for their favorable opinions of credit insurance was that credit insurance is good for those individuals at risk due to age, health, or other factors.¹⁵ These responses reinforce the conclusion that consumers like credit insurance because of the protection and sense of security that it provides.

¹⁰ Durkin, *supra* note 1, at 211.

¹¹ *Id.*

¹² *Id.* at 212.

¹³ *Id.* at 212, tbl.14.

¹⁴ *Id.* at 212.

¹⁵ *Id.*

LEGAL ARGUMENT

The entire business of insurance, at every level, is risk avoidance. Consumers buy insurance to limit their risk of loss due to various events. Insurers offer risk reduction to consumers, and then in turn spread the risk over a pool of purchasers in order to limit the insurer's risk. Insurers further limit their risk by doing business in states with stable, predictable laws which allow them to offer their products at stable, reasonable premiums.¹⁶

Credit insurance follows this pattern. As noted above, consumers purchase credit insurance in order to reduce their risk of default on loans.¹⁷ Creditors offer the insurance both as a courtesy to their customers who desire the product as well as a way to limit the risk of default to the creditor. In addition, creditors and insurers are more likely to offer their products at a reasonable cost in a market without an excess of risk making their costs too high to do business.

Allowing litigants such as Lightner to file collateral litigation outside of the process set forth by statute undermines the balanced, well-crafted statutory structure put in place by the Legislature. The Legislature granted the Insurance Commissioner exclusive and primary jurisdiction over such matters. Allowing Lightner's claims to move forward contravenes those goals. If Lightner's judicial challenge to approved rates is allowed to proceed, the legal process created by the Legislature to ensure risk reduction will be undermined, and consumers, creditors and insurers will be damaged in the process. Creditors and insurers will face a riskier legal

¹⁶ See, e.g., OFFICE OF INSURANCE COMMISSIONER OF WEST VIRGINIA, THIRD PARTY CAUSES OF ACTION: EFFECTS OF WEST VIRGINIA INSURANCE MARKETS, 4-5, 46-47 (Feb. 2005), http://www.wvinsurance.gov/reports/pdf/third_party_causes_action_effects.pdf. [Attached as Exhibit 7 to this Brief.]

¹⁷ See *supra* note 1 and accompanying text.

environment, which may affect the availability of credit insurance.¹⁸ Consumers may ultimately not have the option to purchase a product they have repeatedly stated they value and desire.

I. West Virginia's Consumer Credit and Protection Act specifically allows a creditor to offer credit life, credit disability, involuntary unemployment and credit property insurance at rates filed with the Insurance Commissioner.

W. Va Code § 46A-3-109(b)(3) states: "The premium or identifiable charge for the insurance required or obtained by a creditor **may equal, but may not exceed the premium rate filed by the insurer with the Insurance Commissioner.**" (emphasis added). The types of insurance covered by W. Va. Code § 46A-3-109(b)(3) are credit life, credit disability, involuntary unemployment and credit property insurance.

CitiFinancial charged Lightner the exact same credit life, credit disability and credit property rates that the insurance company had approved by the Insurance Commissioner. Thus, the premiums complained of by Lightner were explicitly approved of using the process set forth by the Legislature.

II. West Virginia's Consumer Credit and Protection Act delegates the determination as to the reasonableness of charges for credit insurance to the Insurance Commissioner, and challenges to those rates are within the primary jurisdiction of the Commissioner.

W. Va. Code § 46A-3-109(a)(4) states that charges for other benefits, including insurance but "are of a type which is not for credit," are permitted if reasonable in relation to the benefits presented by the insurance. **"The determination of whether the charges therefore are reasonable in relation to the benefits shall be determined by the Insurance Commissioner."**

Id. Consistent with that statute, the Legislature delegated the review and approval of all insurance premiums, including premiums for credit insurance, to the Insurance Commissioner, so that insurers could expect uniform, predictable review of premiums. W. Va. Code § 33-2-3(a).

¹⁸

See supra note 16.

When a litigant such as Lightner asserts a claim before a court of the state of West Virginia, and that claim requires resolution of issues committed to the regulatory expertise of an agency, "the judicial process [must be] suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). See also *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993); *Energy Development Corp. v. Cabot Oil and Gas Corp.*, 2006 U.S. Dist. LEXIS 86786, *9-10 (S.D.W.Va. Nov. 30, 2006) (staying proceedings in a case so that Public Service Commission could resolve issues committed to its expertise).¹⁹

The purpose of allowing the Insurance Commissioner to have primary jurisdiction over determination of the appropriateness of insurance premiums is twofold, and both purposes enhance the goals of risk reduction. First, the Insurance Commissioner has specialized knowledge and expertise allowing her to properly evaluate an issue as complex as insurance premiums, an issue "beyond the conventional experience of judges." *State of West Virginia ex rel. Bell Atlantic - West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 411, 497 S.E.2d 755, 764 (1997); see also *Energy Development Corp. v. Cabot Oil and Gas Corp.*, 2006 U.S. Dist. LEXIS 86786, *9-10 (S.D.W.Va. Nov. 30, 2006); *State ex rel. The Chesapeake and Potomac Telephone Co. of West Virginia v. Ashworth*, 190 W. Va. 457, 551, 438 S.E.2d 890, 894 (1993). In other words, the doctrine of primary jurisdiction enhances decision making in a highly complex area.

¹⁹ The doctrine of primary jurisdiction is similar to the doctrine of subject matter jurisdiction, which normally should be determined at the outset of a case: "The urgency of addressing problems regarding subject matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void." *State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W.Va. 696, 701, 619 S.E.2d 209, 213 (2005) (citing *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958), *rev'd on other grounds*, *Patterson v. Patterson*, 167 W.Va. 1, 277 S.E.2d 709 (1981)). See also *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W.Va. 492, 211 S.E.2d 705 (1975) ("Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.").

Second, and perhaps more importantly, committing the review of insurance premiums to the primary jurisdiction of the Insurance Commissioner allows for stability, a key to risk management and avoidance. Granting the Insurance Commissioner primary jurisdiction to evaluate and approve premiums ensures that evaluation and approval will take place under stable, predictable standards. For example, the U.S. Supreme Court has held that determination of issues by agencies with "expert and specialized knowledge" promotes uniformity and consistency in the regulation of business, and assists courts in technical and specialized fields. *Western Pac. R.R.*, 352 U.S. at 64-65. Indeed, other state courts have held that "[o]rderly procedure and administrative efficiency demand that the regulatory body be vested with authority to make preliminary determination of legal questions which are incidental and necessary to the final legislative act." *McGehee v. Mid S. Gas Co.*, 235 Ark. 50, 57 (1962).

Courts have repeatedly applied the primary jurisdiction doctrine in cases challenging insurers' practices. The California Supreme Court noted the benefits of the primary jurisdiction doctrine in *Farmers Ins. Exch. v. Superior Ct. of Los Angeles County*, 826 P.2d 730 (Cal. 1992): "It is readily apparent that a court would benefit immensely, and uniformity of decisions would be greatly enhanced, by having an expert administrative analysis available before attempting to grapple with such a potentially broad-ranging and technical question of insurance law." *Id.* at 745. Also, the court recognized that the insurance commissioner's expertise "might eliminate the need for a trial or might resolve major elements of dispute." *Id.* at 743.

Courts regularly apply the doctrine of primary jurisdiction in cases involving insurance regulation to promote judicial uniformity and economy. At issue in *Birmingham Hockey Club, Inc. v. National Council on Compensation Ins., Inc.*, 827 So. 2d 73 (Ala. 2002), for example, was the proper amount that should be charged for workers' compensation premiums and whether

certain pricing practices constituted fraud, unjust enrichment or otherwise violated State law. The Alabama Supreme Court agreed that "the issues involved in this action come within [the Department of Insurance's] jurisdiction because of the technical questions raised and because expertise in insurance matters and in rate-setting is required to resolve these issues." *Id.* at 82. Moreover, the court recognized that applying the primary jurisdiction doctrine would "assist this Court, and may alleviate entirely the need for resort to judicial relief in this case." *Id.* at 83.

In *Irvin v. Liberty Life Ins. Co.*, No. 00-2719, 2001 U.S. Dist. LEXIS 2935 (E.D. La. 2001), the court stayed an action pending investigation and "exhaustive regulatory examination" by the South Carolina Department of Insurance into whether the industrial life insurance policies at issue were in compliance with State insurance statutes and regulations prohibiting rate discrimination on the basis of race. In doing so, the court recognized that insurance commissioners "are uniquely situated to make these determinations, and they are empowered to do so by virtue of their authority to examine and investigate unfair or deceptive insurance trade practices." *Id.* at *8-*9. The court recognized that the administrative investigation, as well as possible subsequent administrative hearings, would produce a record that would assist the court in litigation over the policies at issue. *Id.* at *9.

Thus, the doctrine of primary jurisdiction allows for orderly, uniform interpretation of a state's insurance laws, which serves to reduce an insurer's risk of litigation and inconsistent interpretations of governing law.²⁰ If an insurer is at risk of litigation over premiums, that risk will be reflected in higher premiums and, potentially, a decision to refuse to offer the disputed product in a given market. Thus, the Legislature made the policy decision to commit the

²⁰ OFFICE OF THE INSURANCE COMMISSIONER, *supra* note 16, at 5.

evaluation of premiums to the Insurance Commissioner so that insurance companies, and in turn, consumers, can rely on the stability granted by that review.

It is clear that lack of stability in a given market directly impacts both the insurance products available and the rates at which those products may be offered. For example, the Legislature passed a bill in 2004 requiring the Insurance Commissioner to evaluate the effect of West Virginia's laws allowing third parties to an insurance contract to directly sue a carrier for unfair trade practices, a practice contrary to that in most states and one which exposes insurers to a higher likelihood of litigation.²¹ After analyzing the history of third party lawsuits in West Virginia and the economic effects of that litigation, the Insurance Commissioner concluded in a report issued in February 2005 that :

[West Virginia's position] is in the minority, and this minority position has deleterious effects on the insurance climate of the state. The result is an insurance climate that is overly litigious and premium rates are higher because of it. The evidence in this report is robust and comes from several credible sources. . . . The economic evidence provided, supported by the academic community, has indicated that the costs associated with the third party doctrine increases the cost of insurance in the state These higher costs are ultimately shifted forward to insurance consumers. . . . The anticipated result will be better for insurance consumers and insurance carriers alike. It is reasonable to expect downward pressure on insurance costs and increased competition as carriers find West Virginia a better place to conduct the business of insurance.²²

In other words, the increased risk of litigation both increases premiums and discourages carriers from offering insurance products to West Virginia consumers. Insurance companies must evaluate the risk inherent in a market, and either refuse to enter the market or pass that risk on to consumers in the form of higher premiums.

²¹ W. Va. Code § 33-2-15b. In other states, a third party has an administrative remedy before the Insurance Commissioner, much like the administrative remedy granted Lightner under the West Virginia Insurance Code, a remedy Lightner has not availed himself of.

²² OFFICE OF THE INSURANCE COMMISSIONER, *supra* note 16 at 46-47.

III. Selective Judicial Review Of Credit Insurance Premiums Will Create Turmoil And Uncertainty In The Insurance And Financial Services Marketplace.

This Court is being asked by Lightner to second-guess the Insurance Commissioner's approval of the rates CitiFinancial's customers were charged for credit insurance. If this Court allows such a challenge to move forward outside of the administrative process set forth by the Legislature,²³ all creditors and insurers will be subject to an unknown number of lawsuits over the reasonableness of the premiums charged for all types of insurance.

The Insurance Commissioner found in a study completed only three years ago that excessive litigation drives up insurance premiums, and gives rise to the risk that insurers will not choose to do business in West Virginia.²⁴ If the reasonableness of rates that are not only statutorily permitted by the Consumer Credit and Protection Act but are also filed with and approved by the Department of Insurance are allowed to be attacked by someone other than the Insurance Commissioner, then it will have a chilling effect on the sale of all insurance products in the state of West Virginia. No lender or insurance company will want to offer its customers an insurance product if it can be subject to suit for allegedly "charging" excessive rates, even though the rates have been filed with and approved by the Department of Insurance. Similarly, insurance companies will be reluctant to offer insurance in a jurisdiction where, despite having

²³ Allowing Lightner to collaterally challenge the premiums charged CitiFinancial's customers in this forum is not only contrary to statutory mandate. Allowing such a lawsuit to continue also raises serious separation of powers issues pursuant to West Va. Const. Art. V § 1 because the evaluation and approval of premiums has been committed by the Legislature to an administrative agency established by the Legislature. *See also Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995) ("administrative agencies are active players in the divisions of powers, and . . . their actions are entitled to respect from . . . the courts."); *State ex rel. County Court of Marion County v. Demus*, 148 W. Va. 398, 401, 135 S.E.2d 352, 355 (1964).

²⁴ OFFICE OF THE INSURANCE COMMISSIONER, *supra* note 16, at 46-47.

rates that are filed with and approved by the Department of Insurance, they are subject to suit for charging excessive rates.

If the risk of offering credit insurance rises and creditors cease offering their customers the opportunity to purchase credit insurance, some consumers most in need and desirable of credit insurance may not be able to purchase it. Credit insurance is a reasonably-priced way for consumers to limit their risk when conventional term insurance is not practicable. In fact, credit insurance may be the only reasonably-priced product on the market which allows these consumers to reduce their risk.²⁵ Consumers have repeatedly stated they value the opportunity to purchase credit insurance—by one count 90% of consumers that had purchased credit insurance on installment credit held a favorable opinion of the insurance²⁶ and 94.2% of borrowers that purchased such credit insurance indicated that they would purchase it again.²⁷ If credit insurers left the market in West Virginia, these consumers would be deprived of a product they clearly value and wish to buy. This result would be contrary to the policy set forth by the Legislature—policy which recognizes that credit insurance serves a social good and should be offered to consumers in West Virginia.

If Lightner's challenge to the approved insurance premiums charged CitiFinancial's customers is allowed to proceed in contravention of the primary jurisdiction granted to the Insurance Commissioner, consumers, creditors and insurers will be faced with the economic reality of higher risk, higher premiums and fewer choices.

²⁵ Cymak, *supra* note 14.

²⁶ Durkin, *supra* note 7, at 211.

²⁷ *Id.*

IV. Referral of Lightner's claim to the Insurance Commissioner will not deprive him of a remedy.

If the Circuit Court were ordered to either dismiss or stay Lightner's claims concerning the reasonableness of the premiums charged CitiFinancial's customers, Lightner will not be deprived of a remedy. W. Va. Code § 33-20-5(d) provides that:

Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective.

In addition, W. Va. Code § 33-20-9(b) also provides that:

Every rating organization and every insurer which makes its own rates shall provide within this state reasonable means whereby any person aggrieved by the application of its rating system may be heard in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance afforded him. If the rating organization or insurer fails to grant or reject such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or such insurer on such request may, within thirty days after written notice of such action, appeal to the commissioner, who, after notice and hearing, may affirm or reverse such action.

Thus, if his claim is dismissed, to the extent Lightner truly believes that he has been charged an unreasonable premium,²⁸ he may avail himself of the procedures in W. Va. Code § 33-20-5(d) or § 33-20-9(b), either of which would entitle him to an administrative hearing conducted in compliance with W. Va. Code § 29A-5-1. The Circuit Court could also stay Lightner's claim

²⁸ In addition, if Lightner thought, upon reflection, that the premiums charged for the credit insurance products he voluntarily bought were too high, he could have canceled the policies at any time and received a refund of the unearned premiums. He never did that. In other words, Lightner received the full benefit of the credit insurance he chose to purchase, but now wants to complain about the price—a price fully disclosed at the outset.

and request the Insurance Commissioner to conduct a hearing concerning the reasonableness of the premiums charged by CitiFinancial. The Legislature has provided Lightner a remedy. He should be required to invoke it.

CONCLUSION

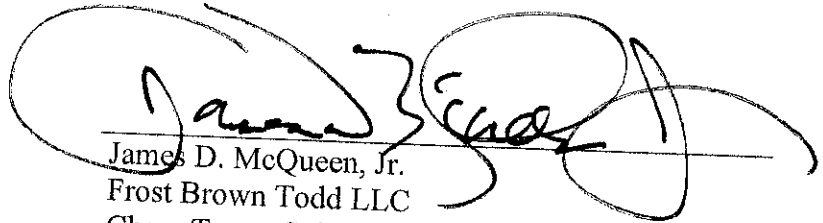
Major surveys conducted in the last twenty-five years indicate that borrowers appreciate the benefits of credit insurance and are happy that they purchased credit insurance. It appears that consumers have weighed the variety of benefits that credit insurance may provide, including security, convenience, and cost and have determined that credit insurance provides the security that they desire for themselves and their families. The Legislature has recognized this benefit, and has allowed consumers to limit their risk by purchasing credit insurance in West Virginia, and has provided creditors and insurers the risk reduction they need by allowing them to offer the insurance at approved rates and by granting primary jurisdiction over premium approval to the Insurance Commissioner. The Circuit Court's order upset the balance struck by the Legislature, a balance which benefits consumers, and improperly expanded statutorily-available remedies.

The Circuit Court exceeded its legitimate powers when it denied CitiFinancial's Motion for Dismissal, for a Stay, and for Partial Summary Judgment. When a circuit court exceeds its legitimate jurisdiction and exposes a defendant to the burden of clearly unwarranted claims, a writ of prohibition must issue. See *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443 (2004); *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99 (2004); *State ex rel. Farber v. Mazzone*, 213 W. Va. 661 (2003); *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87 (1998).

Accordingly, this Court should grant CitiFinancial's Petition for a Writ of Prohibition.

Dated: June 10, 2008

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'James D. McQueen, Jr.', is written over a horizontal line.

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CERTIFICATE OF SERVICE

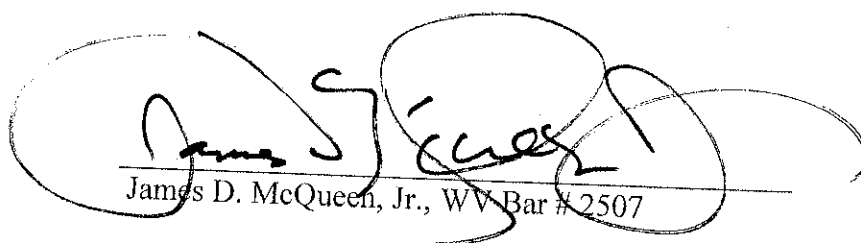
I, James D. McQueen, Jr., hereby certify that a true and exact copy of the foregoing **BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AND THE CONSUMER CREDIT INDUSTRY ASSOCIATION IN SUPPORT OF CITIFINANCIAL, INC.'S PETITION FOR A WRIT OF PROHIBITION** was served via U.S. mail, postage prepaid, with a courtesy copy by facsimile transmission on June 11, 2008 to the following counsel of record:

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